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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-407

BEN HAKE; JOSEPH J. HUNT, JR., President, JOSEPH J. HUNT, SR., Secretary-Treasurer, and SAM SHERELL, Business Agent, All Officers of the International Association of Bridge, Structural and Ornamental Iron Workers, A.F. of L.-C.I.O., Local 396, and RAYMOND D. RHODES, H. WAYNE RHODES, THOMAS J. SHIRLEY, DAVID KLEINDIENST, and PAUL E. KLEINDIENST, All Members of Local 396, and As Officers and Representatives of a Class Consisting of the International Association of Bridge, Structural and Ornamental Iron Workers, A.F. of L.-C.I.O., Local 396,

Petitioners,

vs.

SHIRLEY HELTON, Individually; SHIRLEY HELTON, As Administratrix of the Estate of Norman R. Helton, Deceased; RICKY HELTON and JO ANN HELTON, by SHIRLEY HELTON, Their Next Friend,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, KANSAS CITY DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

Respondents adopt Petitioners' statement of the opinions below.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Respondents disagree that the question presented is as stated in the Petition. The question presented is whether a state common law negligence action requires the application of federal labor law where the labor union's duty of exercising reasonable care toward plaintiffs' deceased was created in the collective bargaining agreement.

STATUTE INVOLVED

Respondents disagree that Section 301(a), Labor Management Relations Act, as amended 1959, 29 U.S.C. §185(a) is involved. This action is not a suit for violation of a contract between an employer and a labor organization but is a common law negligence action based upon the labor union's violation of a duty to exercise reasonable care toward plaintiffs' deceased.

STATEMENT

Petitioners' statement of the case is substantially correct.

REASONS FOR DENYING THE WRIT

Petitioners have attempted to characterize this action as one based upon a failure to enforce a collective bargaining agreement or as one involving the duty of fair

representation. However, the essence of this action, as recognized by both the Missouri Court of Appeals, Kansas City District, *Helton* v. *Hake*, 564 S.W.2d 313 (Mo. App., D.K.C. 1978), and the Federal District Court, Western District of Missouri, *Helton* v. *Hake*, 386 F. Supp. 1027 (W.D. Mo. 1974), is the negligent failure of the union to act, "arising out of a duty owed the employee by a specific union promise contained in the collective bargaining agreement." The only relevancy of the collective bargaining agreement is its creation and definition of the extent of the duty which was violated by the petitioners. Missouri courts have long recognized that liability in negligence may arise from breach of a duty imposed by contract. *Helm* v. *Inter-Insurance Exchange*, 354 Mo. 935, 192 S.W.2d 417 (En Banc 1946); *Braun* v. *Riel*, 40 S.W.2d 621 (Mo. 1931). The union specifically agreed that it would enforce the safety rules and that the employer was not responsible for the performance of these functions (Respondents' Exhibit 16, page 28). Violation by the union of this specific obligation resulted in the death of plaintiffs' deceased and is the basis of this negligence action.

Petitioners cite *Bryant* v. *United Mine Workers*, 467 F.2d 1 (6th Cir. 1972), for the proposition that imposing liability on unions for the employer's failure to comply with safety standards would discourage the inclusion of similar or more effective standards in future labor contracts. While this statement may be true, it has little relevancy to the present action. Liability in the present case was not imposed upon the union for the employer's failure to comply with safety standards but for the union's failure to comply with its specific agreement to assume responsibility for enforcement of safety rules. As indicated by the Missouri Court of Appeals, Kansas City District, *Helton* v. *Hake*, 564 S.W.2d 313 (Mo. App., D.K.C.

1978), if the union is to demand and successfully acquire the full, independent right to enforce safety requirements, it must also accept the accompanying responsibility—the responsibility of responding in damages where its failure to perform its duty results in the death of a beneficiary of that duty. Furthermore, the court in *Bryant* predicated its holding that the collective bargaining agreement imposed no duty to enforce safety rules upon the union on the specific language of the agreement. The agreement provided that the union "may inspect any mine development or equipment." The court said that "[t]he use of the permissive 'may' rather than obligatory language in the clause clearly negatives the possibility that any duty was to be created." *Id.* at 5. The implication of this language is that if the duty is clearly specified in the agreement, the union will be liable for breach of such duty. This is precisely the situation in the present case. The union assumed sole responsibility for the enforcement of safety rules and failed to do so.

Petitioners further argue that respondents' cause of action against petitioners is preempted by federal labor law, citing *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274 (1971), and other cases. However, *Lockridge* is ably distinguished by the Missouri Court of Appeals. That court recognized that the failure of the union to perform the specific duty it had assumed in the collective bargaining agreement was in no way protected by Section 7 of the National Labor Relations Act nor was it an unfair labor practice under Section 8 of that Act.

Respondents' cause of action in this proceeding is and always has been predicated upon the negligence of petitioners in failing to perform a duty created by a specific provision in the collective bargaining agreement. Furthermore, the decision of the courts below will in no way

frustrate or interfere with any national labor policy. The labor union in this case has chosen to assume more than the responsibility of advising and representing its members but has further specifically assumed sole responsibility for enforcement of safety rules. The law has long recognized an employer's duty to furnish a safe worksite, and the union in this case assumed this duty. The union's negligent failure to meet this responsibility is the basis of this suit.

CONCLUSION

Upon all the reasons set forth herein, respondents respectfully submit that this petition for a writ of certiorari should be denied.

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